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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 4, 1993

Mr. William F. Caton

Re: [REDACTED] 1170

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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AUG - 4 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of) MM Docket 93-155
)
RICHARD BOTT II) File No. BAPH-920917GO
(Assignor))
)
and)
)
WESTERN COMMUNICATIONS, INC.)
(Assignee))
)
For Assignment of Construction)
Permit of Station KCVI (FM),)
Blackfoot, Idaho)

TO: The Honorable Arthur I. Steinberg

OPPOSITION TO CONTINGENT INFORMAL REQUEST FOR STAY

Richard P. Bott, II, by his attorneys, hereby opposes the July 26, 1993 "Contingent Informal Request for Stay" ("Stay Request") filed by Radio Representatives, Inc. ("RRI") in the above-captioned proceeding. In support of this Opposition the following is stated:

1. RRI complains that it has not been served with any of the Bott Pleadings¹ in this proceeding and therefore has not had an adequate opportunity to respond to those pleadings. On this basis, RRI requests that the Presiding Judge withhold action on the Bott Pleadings until after he has decided the merits of RRI's Petition

¹ The "Bott Pleadings" refers collectively to Bott's June 25, 1993 Petition for Leave to file Petition for Reconsideration and Petition for Reconsideration, his July 6, 1993 Motion to Delete Issue and his July 15, 1993 Petition for Certification.

for Intervention ("Intervention Petition").² RRI further requests that, in the event the Presiding Judge finds that RRI may intervene, then any further action on the Bott Pleadings be withheld until RRI has been afforded a full opportunity to respond to each of the Bott Pleadings. RRI's request lacks foundation and should be denied.

2. RRI's Stay Request is wholly devoid of any effort to address the showing required for a stay: that it has a substantial likelihood of success on the merits, that it will be irreparably harmed if the stay is not granted, that a grant of the requested stay would not harm Bott, and that the public interest supports the issuance of the requested stay. Virginia Petroleum Jobbers Assn. v. Federal Power Commission, 259 F.2d 921 (2nd Cir. 1958). In the absence of such a showing, the Stay Request should be denied without further consideration.

3. Even had RRI endeavored to make the demonstration required of a person requesting a stay, its effort would have failed. RRI is not now, and at no time since the commencement of this

² It goes without saying that the Presiding Judge may not, as RRI requests, stay action on Bott's Petition for Leave to File Petition for Reconsideration and Petition for Reconsideration. So far as Bott is aware, RRI has not sought a stay from the Commission. However, the Presiding Judge may act on Bott's July 15 "Petition for Certification to Commission", which is ripe for action. If the Presiding Judge were now to grant Bott's certification request, that action would not be inconsistent with any action the Commission might take related to Bott's Petition for Leave to File Petition for Reconsideration, even including a grant by the Commission of a stay request yet to be filed with the Commission by RRI. A grant by the Presiding Judge of Bott's certification request pursuant to Section 1.106(a)(2) grants Bott no ultimate relief. Rather, the Commission is left to determine whether Bott should be granted any relief.

proceeding has been, a party to this proceeding. Unless and until RRI is made a party to this proceeding, Bott has no obligation to serve any pleading on RRI. Section 1.211.³ Lacking standing (and designation) as a party, RRI cannot object to the fact that it has not been served with or afforded an opportunity to respond to the Bott Pleadings.

4. In support of its argument that it has not had adequate time to respond to the Bott Pleadings, RRI affirmatively states that "the filing of these Pleadings was only discovered by RRI on Thursday, July 22, 1993. . . ." Stay Request, p. 1. This statement is diametrically opposed to an earlier RRI representation, the truth of which was certified to by RRI president, Norwood Patterson.⁴ In its Intervention Petition RRI specifically refers to Bott's efforts "to seek reconsideration of the HDO, to delete a specified issue and to petition for the certification of an issue to the Commission. . . ." Id., p. 2. The Intervention Petition was filed one day before, and the facts in the Intervention Petition were attested to two days before, RRI now claims to have

³ RRI has long since missed its opportunity to properly object, pursuant to Section 1.106(a)(1), to the fact that it was not made a party to the proceeding. See Bott's July 30, 1993 Opposition to Petition to Intervene. Moreover, the Commission expressly found that RRI lacked standing to petition to deny Bott's application to assign his Blackfoot construction permit. Since the standards for establishing standing for petitions to deny and intervention are the same, RRI has no standing to intervene. Id.

⁴ RRI's Intervention Petition, filed July 21, 1993, was supported by the July 20, 1993 Declaration of RRI President Norwood Patterson. Patterson's declaration attested to the fact that the statements made therein were "true, complete and correct to the best of [his] knowledge and belief, and [were] made in good faith."

"discovered" the filing of the Bott Pleadings. This is clear evidence (i.e., not a mistaken reading) that RRI misrepresented facts to the Commission either in its representations in its Intervention Petition or in its Stay Request. It demonstrates that even if it were permissible for the Presiding Judge to exercise his discretion under Section 1.223 to allow intervention, which he is not (see note 3, supra), that discretion should be exercised against intervention. RRI's deceitful factual claims show that its intervention would be injurious to the fair and orderly progress of this case.

5. In the unlikely event that RRI's Intervention Petition is granted, RRI still should not be entitled to respond to the Bott Pleadings since they were filed before RRI would have become a party to the proceeding.⁵ To grant RRI's request for stay of any action on the Bott Pleadings would substantially prolong and delay this proceeding and, thus, would substantially prejudice Bott.

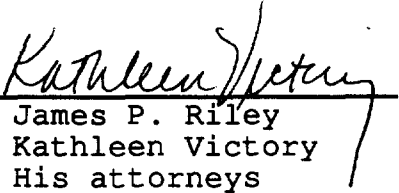
⁵ Had RRI proceeded diligently and had it sought reversal pursuant to Section 1.106(a)(1) of the denial of its status as a party, the procedural route provided by the Commission's rules, RRI, if granted intervention, would have had more than adequate opportunity to respond to the Bott Pleadings or to request an extension of time to respond to those Pleadings. See note 3, supra.

WHEREFORE, in light of the foregoing, Richard P. Bott, II respectfully requests the Presiding Judge to deny the Contingent Informal Request for Stay of Radio Representatives, Inc.

Respectfully submitted,

RICHARD P. BOTT, II

By


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August 4, 1993

CERTIFICATE OF SERVICE

I, Diane Roper, a secretary in the law office of Fletcher, Heald & Hildreth, hereby certify that I have on this 4th day of August, 1993, had copies of the foregoing "OPPOSITION TO CONTINGENT INFORMAL REQUEST FOR STAY" mailed by U.S. Mail first class, postage prepaid, to the following:

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